

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2096

To be submitted

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2096

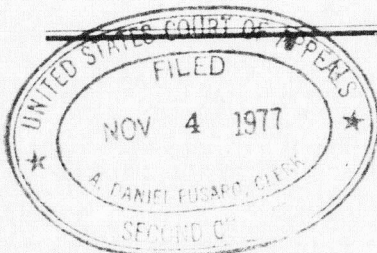
UNITED STATES OF AMERICA,
Appellee,

—v.—

LEE KOO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
ARGUMENT:	
POINT I—The District Court Properly Dismissed Koo's Challenge to the Parole Commission's Ac- tion for Lack of Jurisdiction Under Section 2255	6
POINT II—Judge Bryan's Determination that the Parole Commission's Action is Consistent With His Own Intent is Dispositive of Koo's Claim ..	12
CONCLUSION	14

TABLE OF CASES

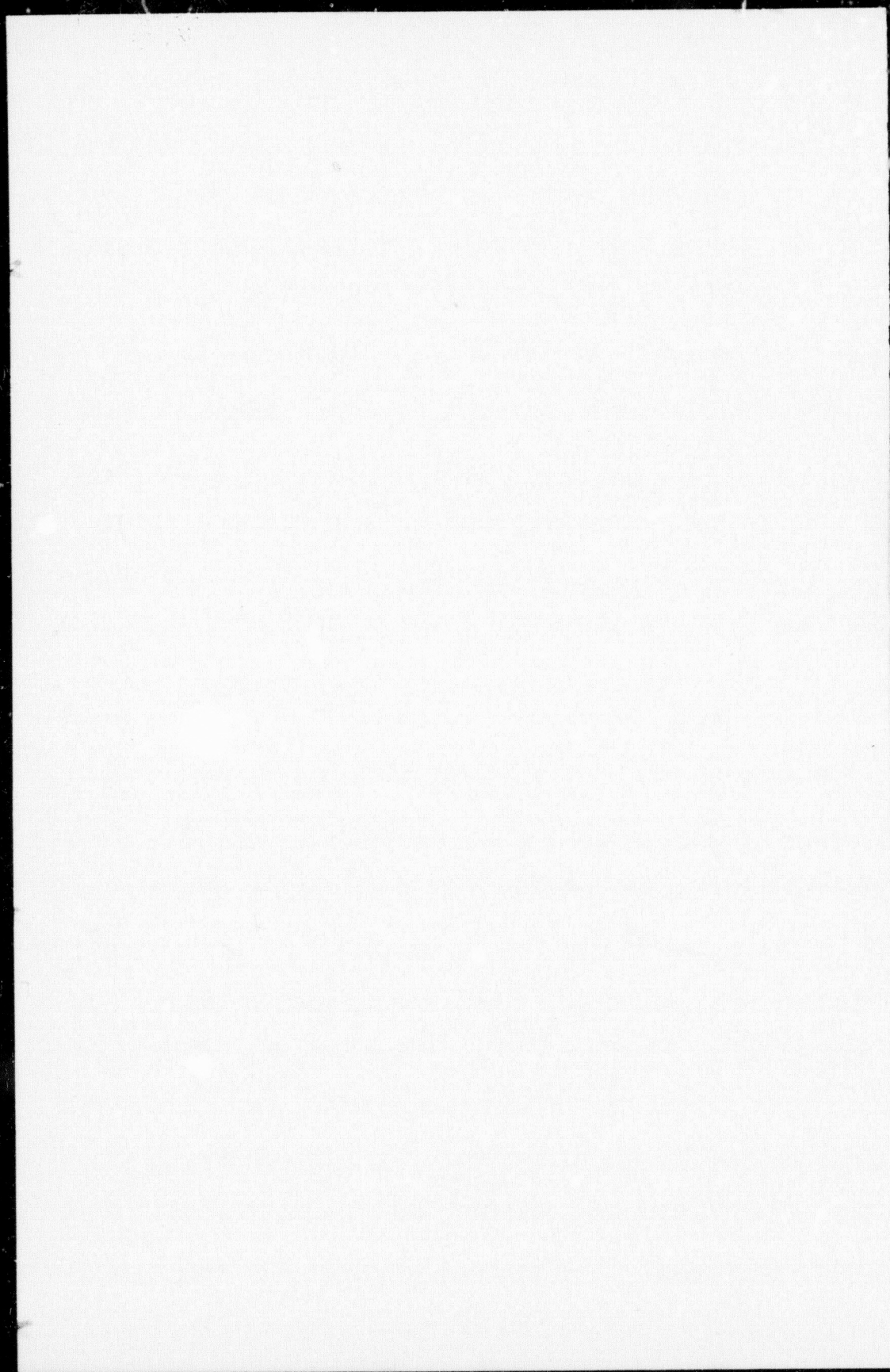
<i>Andrino v. United States Board of Parole</i> , 550 F.2d 519 (9th Cir. 1977)	10, 11
<i>Billiteri v. United States Board of Parole</i> , 541 F.2d 938 (2d Cir. 1976)	8, 11
<i>Braden v. 30th Judicial Circuit Court</i> , 410 U.S. 484 (1973)	8
<i>D'Allesandro v. United States</i> , 517 F.2d 429 (2d Cir. 1975)	9
<i>Grasso v. Norton</i> , 520 F.2d 27 (2d Cir. 1975) .	11, 13, 14
<i>Jacobson v. United States</i> , 542 F.2d 725 (8th Cir. 1976)	10, 11
<i>Kortness v. United States</i> , 514 F.2d 167 (8th Cir. 1975)	10, 11
<i>Pope v. Sigler</i> , 542 F.2d 460 (8th Cir. 1976)	11

	PAGE
<i>Ryan v. United States</i> , 547 F.2d 426 (8th Cir. 1977)	11
<i>United States v. Clinkenbeard</i> , 542 F.2d 59 (8th Cir. 1976)	11
<i>United States v. DiRusso</i> (I), 535 F.2d 673 (1st Cir. 1976)	8, 9, 10, 11
<i>United States v. DiRusso</i> (II), 548 F.2d 372 (1st Cir. 1976)	10, 11
<i>United States v. Huss</i> , 520 F.2d 598 (2d Cir. 1975)	7, 8, 9, 11
<i>United States v. McBride</i> , 21 Crim. L. Rep. (BNA) 2393 (1st Cir., June 20, 1977)	10, 11
<i>United States v. Heng Awkak Roman</i> , 484 F.2d 1271 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 978 (1974)	2, 7
<i>United States v. Salerno</i> (Silverman), 538 F.2d 1005 (3d Cir. 1976)	11
<i>United States v. Slutsky</i> , 514 F.2d 1222 (2d Cir. 1975)	5, 9, 13
<i>United States v. Somers</i> , 552 F.2d 108 (3d Cir. 1977)	11, 12
<i>United States v. White</i> , 540 F.2d 409 (8th Cir. 1976)	11
<i>Zannino v. Arnold</i> , 531 F.2d 687 (3d Cir. 1976)	8

OTHER AUTHORITIES CITED

18 U.S.C. § 2241 (1970)	7, 8, 9, 11
18 U.S.C. § 2255 (1970)	7, 9, 10, 11, 12
18 U.S.C. § 4202 (1970)	4
18 U.S.C. § 4208(a) (2) (1970)	2

	PAGE
18 U.S.C.A. § 4201 <i>et seq.</i> (Supp. 1977)	2
18 U.S.C.A. § 4205(a) (Supp. 1977)	4, 13
18 U.S.C.A. § 4205(b) (2) (Supp. 1977)	2, 4, 5, 10, 11, 12, 13
28 C.F.R. § 2.20 (1976)	5
S. Rep. No. 94-369, 94th Cong., 1st Sess., <i>reprinted</i> <i>in</i> [1976] U.S. Code Cong. & Ad. News 335 ...	2



**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-2096

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEE KOO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lee Koo appeals from orders filed in the United States District Court for the Southern District of New York on May 9 and June 16, 1977 by the Honorable Frederick van Pelt Bryan, Senior United States District Judge, dismissing his motion to vacate and correct his sentence pursuant to 28 U.S.C. § 2255 (1970).

Indictment 72 Cr. 1325, filed December 4, 1972, charged Koo and a co-defendant in two counts with conspiracy to possess, distribute and import narcotic drugs into the United States, and with possession with intent to distribute 2½ kilograms of heroin in violation of Title 21, United States Code, Sections 812, 841, 846 and 963.

Judge Bryan found each defendant guilty of both counts of the Indictment following a four day non-jury

trial. District Court's decision, filed March 19, 1973, is reported at 356 F. Supp. 434 (S.D.N.Y. 1973). Judge Bryan sentenced Koo to consecutive terms of fifteen years' imprisonment on the two counts, to be followed by concurrent three-year terms of special parole. The conviction and sentencing proceeding were affirmed by this Court, 484 F.2d 1271 (2d Cir. 1973), and *certiorari* was denied, 415 U.S. 978 (1974).

On May 28, 1974, Koo moved for a reduction of sentence pursuant to Fed. R. Crim. P. 35. Judge Bryan granted the motion on June 26, 1974 to the extent of providing that Koo's eligibility for parole be governed by 18 U.S.C. § 4208(a)(2), thus enabling him to be eligible for release, in the discretion of the Parole Commission, prior to the one-third point of his thirty-year sentence.*

On January 13, 1977 Koo moved to vacate and to correct his sentence pursuant to 28 U.S.C. § 2255 on the ground that the Parole Commission had acted arbitrarily and unlawfully in failing to release him from incarceration. Judge Bryan determined that Koo might raise his claims against the Parole Commission only in a petition for a writ of *habeas corpus* pursuant to 18 U.S.C. § 2241 in the Northern District of Georgia, where Koo is confined, and dismissed his motion for lack of jurisdiction in an order filed May 9, 1977.

* The Parole Commission and Reorganization Act, Pub. L. 94-233, 18 U.S.C.A. § 4201 *et seq.* (Supp. 1977), replaced the United States Board of Parole with the United States Parole Commission in mid-1976. The act also re-enacted § 4208(a)(2) as § 4205(b)(2). S. Rep. No. 94-369, 94th Cong., 1st Sess. 22, reprinted in [1976] U.S. Code Cong. & Ad. News 335, 344. For simplicity, all references here shall be to the Commission and the current statutory codification.

Subsequently, the District Court treated a letter from Koo dated May 23, 1977 as a motion for reargument. The Court again denied the § 2255 petition, after reaching the merits of one of Koo's claims, in an order filed June 16, 1977.

Koo has served slightly less than five years of his thirty-year sentence and is currently confined in the United States Penitentiary in Atlanta, Georgia.

Statement of Facts

Indictment 72 Cr. 1325 charged Koo and Heng Awkak Roman, a co-defendant, with conspiracy to import a large amount of heroin into the United States from Singapore and with possession of heroin with intent to distribute. The Government's proof at trial before Judge Bryan showed that Koo and Roman distributed some 2½ kilograms of heroin in Singapore to a person working with the Government, and discussed plans to supply the drug on a large scale for the market in the United States. Prior to their arrest, the defendants flew to New York and engaged in negotiations with undercover agents for the sale of an additional 25 kilograms of heroin, and offered to supply between 50 and 100 kilograms a month in the future.

The District Court found both defendants guilty on each of the two counts in the Indictment, and sentenced them to consecutive fifteen-year terms of imprisonment. At the sentencing on March 26, 1973, the Court noted:

These crimes of which you have been convicted and of which you are plainly guilty are extremely vicious and evil. I believe that it must be made clear that anybody who comes into the United States from a foreign country as a mass poisoner, as you two men are, ought to be dealt with to the

limit of the law. I see no excuse for this crime. I see no mitigating circumstances. All I see is an attempt for profit to destroy the lives of hundreds, if not thousands of men and women. (Tr. 409).

The District Court subsequently modified Koo's sentence on June 26, 1974 to provide that he be eligible for parole at such time as the Parole Commission might determine, under 18 U.S.C. § 4205(b)(2), instead of at the end of one-third of his thirty-year sentence, as provided in § 4205(a).*

Koo began his confinement in November, 1972, prior to his conviction. The Parole Commission conducted its first parole determination proceeding for Koo in December, 1974, less than six months after his sentence was made subject to § 4205(b)(2). Release was denied at that time, but a new review proceeding was scheduled for March, 1976, fifteen months later.

The second hearing was held in February, 1976. Parole was again denied, and Koo's case was continued until another scheduled review in January, 1978. In October, 1976, an additional file review was conducted at the instance of the warden at the Atlanta Penitentiary, but the previous decision was affirmed.** Accordingly,

* Section 4205(b)(2) provides for eligibility for parole in the discretion of the Parole Commission. Prior to Judge Bryan's action on Koo's Rule 35 motion, his eligibility for parole was governed by 18 U.S.C. § 4202—now § 4205(a)—which permits release on parole only after a prisoner has served one-third of his term.

** Koo appealed each parole decision pursuant to the appeals procedures of the Parole Commission. He had been tentatively recommended for release by the examiner at each review hearing. He remains subject to deportation to Malaysia should he be released.

Koo will again be considered for parole next January, approximately two months from now.

In January 1977, Koo filed a § 2255 motion before Judge Bryan which raised two claims against the Parole Commission. Koo contended that the Commission had acted arbitrarily and discriminatorily in denying parole to him while releasing Roman, his co-defendant, in April, 1976. He also argued that the Commission's application to his case of its recently-issued release guidelines, of which the District Court may have been unaware at the time of the modification of his sentence, frustrated Judge Bryan's intent in specifying that his parole eligibility be governed by § 4205(b)(2).*

*Koo contended that Judge Bryan could not have been aware of the Commission's guidelines at the sentencing in March, 1973 since they were not published until November of that year. (Traverse at 5.) In fact, the Court modified Koo's sentence in June, 1974, after the guidelines were issued. Nonetheless, the existence of the guidelines was not brought to the general attention of the judges in this Circuit until the Second Circuit Conference in September, 1974. *United States v. Slutsky*, 514 F.2d 1222, 1227 n.17 (2d Cir. 1975).

In any event, the Parole Commission's decisions to deny parole to Koo were made in contravention of the new guidelines, not because of them. The guidelines—which are not binding on the Commission, and which do not take into account the length of sentence imposed by the court, 28 C.F.R. § 2.20 (1976)—indicated Koo be released after serving 26-36 months of his 30-year sentence. The Commission determined in December, 1974, that a decision "outside the guidelines" was warranted in Koo's case because of the unusual seriousness of his offense. (Notice of Action, United States Board of Parole, Dec. 23, 1974, attached to Aff. of Richard F. Ziegler filed April 27, 1977.)

Hence, Koo's claim makes sense only if construed broadly as a contention that he was denied the consideration for parole to which he was entitled under § 4205(b)(2), or that the Commission's failure to release him frustrated the intent of the sentencing court. This interpretation is supported by Koo's brief on appeal, which omits the references to the application of the guidelines present in the papers submitted to the District Court.

The District Court held that Koo's motion failed to raise a claim upon which relief could be granted under § 2255, and dismissed the motion for lack of jurisdiction in an order filed May 9, 1977. That order advised Koo that he could properly file a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of Georgia, in which Koo is confined and his custodian may be found.

Thereafter, Koo submitted a letter, dated May 23, 1977, which suggested that the court had issued its May 9 order prior to receipt of Koo's "Traverse to Government's Response . . ." to his motion. The Court deemed Koo's letter a motion for reargument, and filed a second order on June 16, 1977 which affirmed the previous decision. The second order specifically denied, on the merits, the claim emphasized in Koo's "Traverse" that the sentencing court's intent had been frustrated by the Parole Commission's action. Judge Bryan noted that Koo "has on several occasions prior to the one-third point [of his sentence] received serious and meaningful parole consideration. . . ." The Court concluded "[s]entencing expectations thus have not been frustrated in any way. . . ."

ARGUMENT

POINT I

The District Court Properly Dismissed Koo's Challenge to the Parole Commission's Action for Lack of Jurisdiction Under Section 2255.

Appellant Koo makes no contention that his trial was unfair, that his conviction was obtained in violation of the Constitution, or that his sentence exceeds statutory limits. Instead, his only allegation is directed to the refusal of the Parole Commission to release him from a

concededly lawful incarceration.* The rule is firmly established that such a claim, while proper on a petition for a writ of *habeas corpus* pursuant to 18 U.S.C. § 2241, is not cognizable on a motion to the sentencing court under § 2255.**

Thus, in *United States v. Huss*, 520 F.2d 598, 604 (2d Cir. 1975), this Court adopted as its own the following analysis of the District of Columbia Court of Appeals:

"Although a motion under Section 2255 may be utilized to attack a sentence which is 'in excess of the maximum authorized by law,' this refers only to the sentence as *imposed*, as distinct from the sentence as it is being *executed*. If appellant's sentence is being executed in a manner contrary to law . . . he may seek *habeas corpus* in the district of his confinement. Section 2255 is not broad enough to reach matters dealing with the execution of sentence . . ." (original emphasis; citations omitted).

* Koo's implicit contention that Judge Bryan acted improperly in sentencing him without the benefit of a pre-sentence report was fully explored in his direct appeal and was decisively rejected by this Court. *United States v. Heng Awkak Roman*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974).

** Title 18, United States Code, Section 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Though not confronted with a challenge to a decision of the parole authorities in *Huss*, the Court specifically found persuasive "[c]ases holding that a § 2255 motion is not available to challenge parole board decisions. . . ." 520 F.2d at 604. And the same principle underlies the decision in *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976), which held that a petition for a writ of *habeas corpus* is the exclusive remedy available to a prisoner who challenges the fact or duration of his physical confinement. 541 F.2d at 948.

Koo's first contention, that the Parole Commission acted improperly in denying him parole while releasing his co-defendant,* is a challenge clearly confined to the execution and duration of his admittedly lawful sentence. Accordingly, the decision of the District Court that it was without jurisdiction to pass on the merits of Koo's claim under § 2255 was entirely correct. *United States v. Huss, supra*; *Billiteri v. United States Board of Parole, supra*. *Accord, Zannino v. Arnold*, 531 F.2d 687, 689 n.5 (3d Cir. 1976); *United States v. DiRusso*, 535 F.2d 673, 675-76 (1st Cir. 1976).

As Judge Bryan noted in his order of May 9, 1977, Koo may challenge the Parole Commission's action by filing a petition for a writ of *habeas corpus*—and solely by such a petition—under 28 U.S.C. § 2241. An action based upon that section may be brought only in the judicial district in which the petitioner's custodian is located. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973); *Billiteri v. United States Board of Parole, supra*, 541 F.2d at 948. Since Koo is confined in the United States Penitentiary in Atlanta, his motion before

* Though Koo's original motion papers asserted a violation of equal protection arising from the release on parole of his co-defendant, his subsequently-filed traverse apparently withdrew that claim. (Traverse at 4.) Koo's brief on appeal, though ambiguous, appears to reassert the contention.

Judge Bryan could not be construed as a *habeas corpus* petition, and was properly dismissed.

The result reached by the District Court, which envisioned that Koo file a § 2241 petition in the United States District Court for the Northern District of Georgia, is entirely consistent with the policy behind the enactment of § 2255. It is evident that Congress did not intend to transfer to the sentencing court all complaints regarding internal prison administration which may be pressed under § 2241. *United States v. Huss, supra*, 520 F.2d at 603-04. Indeed, the issues raised by Koo's claim of arbitrary and unequal treatment by the Parole Commission may be litigated most conveniently in the district where Koo is confined and where the relevant witnesses and records are located. *See United States v. Huss, supra*, 520 F.2d at 603; *United States v. DiRusso, supra*, 535 F.2d at 676.

The second aspect of Koo's motion suffers from the same jurisdictional defect as the first. Koo apparently contends that the Parole Commission has failed to afford him the consideration for parole to which he is entitled by virtue of his § 4205(b)(2) sentence, or has frustrated the intent of the sentencing court, as evidenced in Judge Bryan's invocation of that section, by failing to release him from custody.* This claim also focuses on the duration of Koo's confinement and the Parole Commission's exercise of discretion, not the legality of Koo's conviction or sentence; it, too, may be raised in a proceeding for collateral relief only pursuant to *habeas corpus* petition.**

* See footnote, p. 5, *supra*.

** The claim may also be raised in a timely motion before the sentencing court under Rule 35, Fed. R. Crim. P. *See United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975). But a district court may not circumvent the time limitations of Rule 35 and modify a sentence, upon a § 2255 motion, in order to thwart the decision of the Parole Commission. *See D'Allesandro v. United States*, 517 F.2d 429, 435 (2d Cir. 1975).

Moreover, the Courts of Appeals for the First and Ninth Circuits have specifically rejected claims indistinguishable from Koo's for lack of jurisdiction under § 2255. *United States v. McBride*, 21 Crim. L. Rep. (BNA) 2393 (1st Cir., June 20, 1977); *Andrino v. United States Board of Parole*, 550 F.2d 519 (9th Cir. 1977); *United States v. DiRusso*, 535 F.2d 673, (DiRusso I), 548 F.2d 372 (DiRusso II) (1st Cir. 1976). Thus, the First Circuit reasoned in *DiRusso I*:

What looms large and open-ended to us is the implied principle that a proper claim for relief under § 2255 could be made to a sentencing judge by a prisoner confined in an institution in another district at any time when he can allege that the conditions of his confinement differ from what the judge had contemplated at the time of sentencing. Reading the grounds specified in § 2255, we can find no license for this kind of continuing jurisdiction. 535 F.2d at 675.

Indeed, it is apparent from the jurisdictional prerequisites in the text of § 2255 that the statute simply does not extend to the challenge to Parole Commission action which Koo presses.*

* The Court of Appeals for the Eighth Circuit has upheld § 2255 jurisdiction to consider challenges to application of Parole Commission guidelines in certain limited circumstances not present in this case. In *Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975), that court held that a prisoner might be entitled to relief under § 2255 where a sentencing judge imposed sentence pursuant to 18 U.S.C. § 4205(b)(2) without being aware of the impact of the Commission guidelines. Nonetheless, subsequent decisions in the Eighth Circuit, responding to "a flood of pro se § 2255 motions" asserting a denial of meaningful parole consideration, *Jacobson v. United States*, 542 F.2d 725, 727 (8th Cir. 1976), have sharply limited *Kortness*.

Thus, the Eighth Circuit has specifically limited jurisdiction under § 2255 to cases in which the prisoner was both sentenced

[Footnote continued on following page]

To the extent Koo contends that the decisions of the Parole Commission in his case offend due process or are otherwise illegal or unconstitutional, he may properly pursue that claim by *habeas corpus* petition, as noted in *Huss*, *Billiteri*, *McBride*, *Andrino* and *DiRusso*. Any expansion of the scope of § 2255 to encompass Koo's claim would confer on sentencing courts an unwarranted authority to contravene decisions of the Parole Commission upon a simple showing that they were unanticipated. Such authority would be limited by neither the time deadlines imposed by Rule 35 nor the proof of unconstitutionality or illegality required by § 2241. Furthermore, such a result would dramatically alter the existing division of power which Congress has consciously created between the sentencing judge and the parole authorities. See *Grasso v. Norton*, 520 F.2d 27, 32 (2d Cir. 1975); *United States v. McBride*, *supra*, 21 Crim. L. Rep. at 2393.

under § 4205(b)(2) at a time when the Commission's guidelines were not known to the sentencing court, and has been denied meaningful consideration for release by the Parole Commission at or prior to the one-third point of his sentence. Where one or both of these elements are absent—as in the instant case—the court has remitted the prisoner to whatever relief is available under § 2241. *Ryan v. United States*, 547 F.2d 426 (8th Cir. 1977); *United States v. Clinkenbeard*, 542 F.2d 59 (8th Cir. 1976); *Pope v. Sigler*, 542 F.2d 460 (8th Cir. 1976); *Jacobson v. United States*, *supra*; *United States v. White*, 540 F.2d 409 (8th Cir. 1976). As appears in the discussion of the merits of Koo's claim in Point II, *infra*, Koo has received ample parole consideration well in advance of the one-third point of his sentence. Even under the Eighth Circuit's broad interpretation of § 2255, therefore, Koo's motion would be dismissed for lack of jurisdiction.

The Third Circuit, which has followed the Eighth Circuit's analysis without extensive explanation, see *United States v. Somers*, 552 F.2d 108, 113 n. 9 (3d Cir. 1977); *United States v. Salerno* (Silverman), 538 F.2d 1005, 1008 n. 4 (3d Cir. 1976), reached its result prior to the flat rejection of the *Kortness* rule persuasively enunciated by the First Circuit in *United States v. McBride*, *supra*.

And it would place a substantial burden, doubtless undesired, on the District Courts.

Accordingly, Judge Bryan acted correctly in dismissing Koo's § 2255 motion on jurisdictional grounds.

POINT II

Judge Bryan's Determination that the Parole Commission's Action is Consistent With His Own Intent is Dispositive of Koo's Claim.

Koo argued before the District Court that the Parole Commission's failure to release him must be inconsistent with what Judge Bryan intended to accomplish by modifying Koo's sentence to provide for "early" parole eligibility under 18 U.S.C.A. § 4205(b)(2) (Supp. 1977).

The compelling answer to this argument, should the Court find it has jurisdiction under § 2255 to entertain it, is that the District Court has negated the existence of any such inconsistency. In his order of June 16, 1977 denying Koo's motion, Judge Bryan declared: "[s]entencing expectations . . . have not been frustrated in any way. . . ."

Having asked the District Court whether its expectations were thwarted by the action of the Parole Commission and having received a negative response, Koo has no possible basis for complaint in this Court. Indeed, the Third Circuit has noted in a similar case that appellate review in such circumstances is essentially unavailable, for "the original sentencing judge is in the best position to know his own intent and . . . his determination of that intent is conclusive. . . ." *United States v. Somers*, 552 F.2d 108, 109 (3d Cir. 1977).

Moreover, this is not a case, like *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975), relied upon by Koo,* in which a credible claim may be asserted that the Parole Commission has deprived a prisoner of his due under § 4205(b)(2). In *Slutsky*, the Commission had denied the prisoner, whose parole was governed by § 4205(b)(2), any meaningful review of his status until he served one-third of his sentence, the same point at which he would have been considered for parole even had he received a regular sentence under § 4205(a). *Slutsky* failed to bring that fact to the attention of the District Court on his timely Rule 35 motion, however, and this Court remanded the case for reconsideration in light of its finding that, as a result of the application of the Commission's new guidelines, the defendant "in all probability . . . will not receive the parole treatment envisioned by the sentencing judge," 535 F.2d at 1229.

Koo can make no such showing, because the existence of the Commission's guidelines have had no effect whatever on the consideration for parole which has been afforded to him. Unlike *Slutsky*, Koo—who will not have served one-third of his sentence until 1982—has already received three parole review proceedings in the past three years and is scheduled to receive a fourth in January, 1978, just two months from now.

This Court has determined in *Grasso v. Norton*, 520 F.2d 27 (2d Cir. 1975), that a sentence pursuant to § 4205(b)(2) requires only that the prisoner receive serious and meaningful parole consideration, reflecting the prisoner's institutional performance, prior to the one-third point of his sentence. The record demonstrates that Koo has received much more than the consideration mandated

* Though not cited in his appellate brief, *Slutsky* is referred to extensively in the papers Koo presented to the District Court.

by *Grasso*. Thus, Judge Bryan's decision to deny Koo's motion is doubly proper, for the Parole Commission has neither defeated the intent of the sentencing court nor denied Koo any of the consideration for parole to which he is entitled under the law.

CONCLUSION

The orders of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Betty J. Santangelo being duly sworn,
deposes and says that she is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *4th* day of *November*, 1977,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

*Lee Koo
United States Penitentiary
Box PMB-77109-158
ATLANTA, GEORGIA 30315*

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Betty J. Santangelo

Sworn to before me this

4th day of *November*, 1977

Jeanette Ann Grayeb
JEANNETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1341575
Qualified in Kings County
Commission Expires March 30, 1979

